Supreme Court, U.S.
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No. 03- ____

In the Supreme Court of the United States

SALLY HINES and ERIN HINES,
Petitioners,

v.

CITY OF CHICAGO, OFFICER DAMON FERRER, Chicago Police Officer, Star No. 8328 and JULIE M. HUDSON, Chicago Police Officer, Star No. 12088,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The first question presented for review relates to the City's refusal to disclose the identity of the police officers involved in the unlawful search based on a claim that that information was exempt under § 7 of the Freedom of Information Act. The applicable exemptions were the following under § 7(1)(c) which provides in pertinent part for the exemption of records compiled by any law enforcement agency to the extent the disclosure would:

   "(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;

   (iv) unavoidably disclose the identity of a confidential source or confidential information furnished only by the confidential source;

   (v) disclose unique or specialized investigative techniques other than those generally used and known or disclosed internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct;

   (vii) endanger the life or physical safety of law enforcement personnel or any other person; or

   (viii) obstruct an ongoing criminal investigation."

The question is whether Plaintiffs were entitled to rely on Defendants' assertion that the requested information was exempt under the Freedom of Information Act.

2. The second question presented for review is whether the period from the date of expiration of the statute of limitations to the date of the disclosure of the requested information would be excluded in determining the application of the doctrine of equitable estoppel to bar the protection of the statute of limitations for that period.

3. The third question presented for review is whether the period of fifty-seven days from the disclosure of the requested information to the notice to the Defendants of a Motion to file the Amended Complaint with the proposed Amended Complaint attached which named the police officers was an unreasonable time so as to bar the doctrine of equitable estoppel.

4. The fourth question presented for review is whether the assertion of exemption was so knowingly and egregiously false as to deny any right to claim the benefit of the statute of limitations for the period between the disclosure of the requested information and the date of filing the Amended Complaint.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, Sally Hines and Erin Hines, are individual women living in the City of Chicago at the time of the incident. Respondents, Chicago Police Officers Damon Ferrer and Julie M. Hudson are residents of Cook County, Illinois.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Sally Hines and Erin Hines, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on February 4, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals on Order entered February 20, 2004 denying Petitioners' Petition for Rehearing is reproduced in **Appendix A**. The prior opinion of the Court of Appeals affirming the judgment of the District Court by Order entered January 21, 2004 is reproduced in **Appendix B**. The prior opinion of the United States District Court for the Northern District of Illinois granting summary judgment entered February 10, 2003 is reproduced in **Appendix C**.

STATEMENT OF JURISDICTION

The Court of Appeal's decision was entered on January 21, 2004. Petitioner filed a timely Petition for Rehearing on February 4, 2004. The Court of Appeals denied the Petition for Rehearing on February 20, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Illinois Freedom of Information Act, 5 ILCS 140/7

Federal Freedom of Information Act, 5 USC § 552(B)(1)

STATEMENT OF THE CASE

A. Factual Background

This case was an action against the City of Chicago and two unknown police officers, Jane Doe and John Doe, alleging an unlawful arrest and strip search of Plaintiffs at 10:00 p.m. on January 1, 2000 in the City of Chicago. On February 10, 2003, the District Court granted a Motion to Dismiss filed by the Corporation counsel representing the by then identified Chicago Police Officers, Damon Ferrer and Julie M. Hudson, on the grounds that the statute of limitations with respect to the action against the individual officers expired on January 1, 2002, that Plaintiff took in excess of seven months to identify the names of the police officers, and that there was no equitable tolling of the statute of limitations because Plaintiffs were not diligent in taking steps available to them to identify the names of the police officer.

B. Statement of Facts

The two year statute applicable to suits against police officers expired on January 1, 2002 which was two years after the incident complained of which occurred on January 1, 2000.

Beginning December 16, 2000 Plaintiff made a number of efforts to obtain the names of the police officers by various communications with the Chicago Police Department including:

(1) A letter by Plaintiffs' attorney John A. Cook to the Chicago Police Department Office of Professional Standards dated December 6, 2000 requesting information concerning the incident involving

Plaintiffs, Sally and Erin Hines, on January 1, 2000. (App. 6.)

(2) A follow-up letter of Mr. Cook to Chicago Police Department Professional Standards dated February 23, 2001 advising that no response had been received to the earlier letter. (App.7.)

(3) A response letter from Mr. Joseph T. Fakuade to Mr. Cook dated May 24, 2001 advising that Mr. Cook's letter to Superintendent Hilliard dated May 17 had been referred to the Office of Professional Standards. (App.8.) This letter disclosed that a complaint register no. 259078 was registered by Ms. Sally Hines on January 4, 2000 and had been forwarded to the Internal Affairs Division for their investigation. The Fakuade letter suggested that Mr. Cook should "feel free to contact the Internal Affairs Division at (312) 745-6310 between the hours of 8:00 a.m. and 5:00 p.m. You can also write them at: Chicago Police Department, 3510 S. Michigan Ave., Attention: Internal Affairs, Chicago, Illinois 60653."

(5) A letter dated July 12, 2001 from Mr. Cook to Fakuade advising that:

"I have had no response from Internal Affairs Division and today I telephoned Internal Affairs and was referred to their Records Section to talk to Sergeant Rozupapa. Sergeant Rozupapa said that they would have no information and that any complaint would be forwarded to Legal Affairs. She gave me the name of Officer John Golar, his phone number 745-6115.

I telephoned Officer Golar and explained that I was interested in receiving a copy of the file on number 259-978. He said that the file was exempt under the Freedom of Information Act. However, he said I should receive from Internal Affairs a letter advising as to their findings or if their investigation was still in process I should get a letter to that effect.

I therefore write to you with a request that you take whatever steps are necessary to have the Internal Affairs Division respond to my inquiry.

I note that my first letter to the police department was December 6, 2000 and relates to an incident on January 1, 2000 concerning Sally and Erin Hines, her sister.

Please advise by phone or by letter as to when I can expect a response to my inqttiries." (App.9)

There was no response by phone or letter to the July 12, 2001 letter.

On April 12, 2002 a motion was filed by the City to Dismiss Count I of the Amended Complaint.(R. 5 and 6) This motion was granted June 28, 2002 and the City was dismissed from the case. (R. 13.) This Petition does not concern that order.

On July 10, 2002, Plaintiffs served a Rule 34 Notice for Production of Documents in the District Court. (App. 10). The Rule 34 Request refer to the documents in the above sequence of correspondence between attorney Cook and the Chicago Police Department between December 6, 2000 and

July 12, 2001. It requested all documents relating to the Cook inquiry in his letter of December 6, 2000 including the

"a. Report made by Sally Hines, the names and star numbers and current home addresses of the two officers involved and the number of the squad car and any report that they may have found as requested in the letter and any further follow-up concerning the incident or the activities of the police";

b. "Documents relating to any further information developed by February 23, 2001, the date of the follow up letter to the Office of Professional Standards";

c. "All documents developed or made available to Terry Hilliard, the Superintendent of Police, relating to the Sally and Erin Hines incident the lack of response to the earlier letters to the Office of Professional Standards . . . .";

d. "All documents relating to "inquiries to Superintendent Hilliard as developed or found, including correspondence and memoranda thereto as indicated in the letter of Joseph T. Fakuade . . . of May 24, 2001 . . . including any follow-up response or inquiries to the Internal Affairs Division";

e. "The letter to Mr. Fakuade dated July 12, 2001 including any information which was not available through the Record Section, the determination by Officer Golar that the file on 259078 was exempt under the Freedom of

Information Act; or any other response to Internal Affairs advising as to their findings or if their investigation was still in progress, or a memorandum pertaining to the conversations between John A. Cook by phone to Officer Golar or to his Sergeant Rozupapa";

f. "The personnel file pertaining to each of the two officers whose names are yet unknown, but have been identified in the records of the Department, including any information concerning complaints, disciplinary proceedings, special instructions, or matters relating to Complaint CR259078"; and

g. "Any special procedures, announcements or publications by the Chicago Police Department with respect to extra police activities in high-crime districts in the City of Chicago during the years 1999 and 2000 and the identification of any high-crime districts during that period with particular reference to crimes involving sale of illegal substances".

On July 16, 2002, the Corporation Counsel wrote a letter to attorney Cook advising:

"I am in receipt of your Rule 34 Request for Production of Documents. As you are well aware, Judge Zagel dismissed Count I of Plaintiffs' Complaint against City in his Minute Order dated June 28, 2002. Thus, defendant City of Chicago having been dismissed in this litigation, has no further obligations to respond to any discovery requests. However, as a courtesy, I will inquire as to the status

> of the CR you referenced in the attached letters to your Request for Production of Documents. Please contact me if you have any questions or concerns. Sincerely,
> Arnold H. Park
> Assistant Corporation Counsel" (Emphasis supplied) (App. 11)

The City of Chicago had 30 days under F.R.C.P. 33(b)(3) (August 8, 2002) to respond to the request for production.

In order to expedite receipt of the requested information, Plaintiffs caused a subpoena to be issued by the Clerk of the District Court to the City of Chicago on July 26, 2002 and to be served on that date. The subpoena requested the same documents that were requested in the Rule 34 Request for Production of Documents. (App. 5) (App. 12)

On August 12, 2002, attorney Cook received a letter from the Corporation Counsel dated August 8, 2002, stating objections to the subpoena about identifying the original reports of the incident of January 1, 2000. Despite the objections, the Corporation Counsel stated:

> "Please find enclosed the documents you requested in your subpoena in the above captioned matter. [Hines v. City of Chicago] I will also be forwarding to you a copy of the Chicago Police Departments' Rules and Regulations which established the procedure for conducting strip searches."

Among the enclosed documents were a copy of the two original arrest cards by Officer Ferrer dated January 1, 2000 at 12:18 a.m. for Sally Hines and 12:20 a.m. for Erin Hines. The stop was at 4731 West Huron in Chicago. Sally was

described as a blond, blue-eyed white female born March 6, 1981. She was eighteen years old at the time of the arrest. Erin was described as a blond, hazel-eyed white female born October 8, 1979. She was twenty years old at the time of the arrest. Officer Ferrer, on the arrest card, with respect to Sally Hines, made the following entry on the part of the form providing for "Remarks (give reason for a stop and list person in company of above when stopped)":

> "Above person stopped for a narcotics field interview, name check, PD 7/Zone 10 negative. No warrants, Clear."

On the arrest card with respect to Erin Hines, Officer Ferrer made the following entry:

> "SS ?? Unknown. Above stopped for narcotics field interview. PD 7 name check."

Nothing was said about the strip search.

The Corporation Counsel also produced a report dated January 30, 2000 from Sergeant George S. Gottlieb no. 798, 11th District to Lieutenant Dana Starks, acting commander, 11th District. The subject was CR #259078; Interview with Complainant, Sally Hines and Victim, Erin Hines:

> "1. On 30 January 2000, I spoke with the complainant, Sally Hines and the listed victim, Erin Hines by telephone. In summary, they related the following sequence of events:
>
> 2. Sally Hines said while her and her sister, Erin, were looking for Erin's boyfriend in the 4700 block of West Ohio, two uniformed officers, one Hispanic

male and a Black female, stopped her auto. Sally said that the police officers made her and Erin get out of the car, searched her car and purse and pulled off her and Erin's shirts. The officers made her and Erin pull down their pants and the female officer looked at their privates. Sally said the officer wrote down their names and let them go. Sally said that she later found $10 dollars missing from her purse.

3. Erin Hines related basically the same account of what occurred but did not mention the missing $10 dollars that Sally alleged."

The summary report digest of the police department in the investigation by Sergeant Gottlieb showed the address of the incident as 4750 West Ohio Street, Chicago, Illinois. The date was shown as January 2000 at 23:00 hour or 11:00 p.m. Officer Ferrer joined the department on January 6, 1960 and is shown as a male Hispanic. Officer Hudson joined the department on June 21, 1999 and is shown as female black.

The records of the department also show a complaint against a department member received by the department on January 4, 2000 at 2:45 p.m. with the incident shown as 4800 West Ohio at 11:00 p.m. on January 1, 2000. The Complaint was assigned to the Eleventh District. Sergeant Gottlieb of the Eleventh District filed his report to the acting commander of the Eleventh District dated January 30, 2000 that he talked to Sally and Erin Hines by telephone. The report stated:

"2. Sally Hines said that while her and her sister, Erin, were looking for Erin's boyfriend in the 4700 block of West Ohio, two uniformed officers, one Hispanic male and a black female stopped her auto. Sally said the police officers made her and Erin get

out of the car, searched her car and purse and pulled off her and Erin's shirts. The officers made her and Erin pull down their pants and the female officer looked at their privates. Sally said the officers wrote down their names and let them go. Sally said she later found $10 missing from her purse."

"3. Erin Hines related basically the same account of what occurred but did not mention the missing the $10 that Sally alleged."

C. The District Court Proceedings

This action was initially filed on December 12, 2001 in the Circuit Court of Cook County as an action by the Plaintiffs against the City of Chicago, Officer John Doe and Officer Jane Doe. Plaintiffs claimed an unlawful strip search by two unidentified Chicago Police Officers at 10:00 p.m. on January 1, 2000 on Ohio Street just east of Cicero. On January 8, 2002, Defendants filed a Notice of Removal transferring the action to the United States District Court for The Northern District of Illinois on the grounds that on the face of the complaint this was a civil rights action which arises under the United States Constitution and involves a federal question. Defendants were therefore entitled to removal of the action to the District Court pursuant to 28 U.S.C. 1441(b)(c). On February 10, 2003 the trial judge granted the motion of Defendants Police Officer Ferrer and Police Officer Hudson to dismiss on the grounds that the action was barred by the two-year statute of limitations applicable to suits against police officers. Appendix C.

D. The Court of Appeals Decisions

Plaintiffs appealed to the Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the judgment of the District court on January 21, 2004. Appendix B. The Court of Appeals denied Plaintiffs' Petition for Rehearing on February 20, 2004. Appendix A.

ARGUMENT

1. The Writ of Certiorari should be allowed because the trial court failed to apply the doctrine of equitable estoppel against the assertion by Defendants that the action was barred by the statute of limitation.

The Court of Appeals erroneously affirmed the decision of the trial court that Plaintiffs' action was barred by the statute of limitations and that Defendants were not equitably estopped from claiming the protection of the statute of limitations.

The basis for equitable estoppel was that Defendants were denied information as to the identity of the police officers from a period beginning July 12, 2001 when the attorney for Plaintiffs was advised by Officer Golar of the Chicago Police Department that the file was exempt under the Illinois Freedom of Information Act and ending on August 12, 2002 when the requested information identifying police officers Damon Ferrer and Julie M. Hudson as the officers involved was received from the Corporation Counsel by Plaintiffs' attorney on August 12, 2002. On October 15, 2002, Plaintiff served Notice of Motion to file an Amended Complaint naming officers Ferrer and Hudson as named party defendants. On October 29, 2002, Judge Zagel allowed the

Motion. Summons was then placed for service and was served on Defendants officers Ferrer and Hudson. No answer was filed but instead a motion was filed to dismiss on the grounds that the action was barred by the statute of limitations. The motion included a memorandum in support of the motion. On January 14, 2003, Plaintiffs filed a response to Defendants' motion and memorandum. On January 23, 2003, Defendants filed a Reply to Plaintiff's Response. On February 5, 2003, Plaintiffs filed a Surreply. There was no oral argument. On February 10, 2003, the trial judge allowed Defendants' motion and dismissed the action on the grounds that it was barred by the statute of limitations.

The time period between the disclosure of the identity of the officers received on August 12, 2002 to the notice of motion and motion served on Defendants and filed with the Court, October 15, 2002, was fifty-seven days. In this relatively brief period after the identity of the police officers was finally disclosed, the Labor Day holiday intervened, reducing the available time to fifty-four days. The file had to be reviewed and after consultation with the client the notice of motion and proposed Amended Complaint was filed. Fifty-four days could not reasonably be considered as so long as to bar the claim that Defendants were equitably estopped from asserting the bar of the statute of limitations. No harm was done to Defendants by the lapse of fifty-four days. Defendants had investigated the claim more than two years before and within sixty days after the incident. Defendants were not prejudiced by the fifty-four day period.

2. The Chicago Police Department unlawfully refused to supply requested information to Plaintiff's counsel on the grounds that the requested information as to the identity of the police officers involved in the incident was barred under the Illinois Freedom of Information Act. This is an important question for review by the United States Supreme Court because of the wide use of Freedom of Information Acts at both the state and federal level including various provisions for exemption.

There are extensive exemptions from disclosure under § 7 of the Illinois Freedom of Information Act. Generally, these exemptions would not be related to the information requested by Plaintiffs[1].

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[1] The general classes of exemption are information specifically prohibited from disclosure by federal or state law (§7(1)(a)); information that, if disclosed, would be a clearly unwarranted invasion of personal privacy (§ 7(1)(b)); criminal history record information other than certain court or law enforcement records (§ 7(1)(d)); records that are related to or affect the security of correctional restitutions (§ 7(l)(e)); preliminary drafts or other documents relating to the preparation of legislative documents (§ 7(1)(f)); trade secrets and commercial or financial information obtained from a person or business where the information is proprietary (§ 7(l)(g)); proposal and bids relating to contracts or agreements which if disclosed, would frustrate procurement (§ 7(1)(h)); valuable formula, designs and research of a public body where disclosure would reasonably be expected to produce private gain or public law (§ 7(1)(I)); test questions and other examination data used to administer an academic examination (§ 7(l)(j)); architects' plans and engineers' submissions for project not constructed or developed with public funds to the extent the

However, there were important subsections of § 7 in Subsection 1(c) which could relate to activities of the Chicago Police Department which would exempt a request for information which would:

> "(i)interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;
>
> (iv)unavoidably disclose the identity of a confidential source or confidential information furnished only by the confidential source;
>
> (v) disclose unique or specialized investigative techniques other than those generally used and known or disclosed internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct;
>
> (vii) endanger the life or physical safety of law enforcement personnel or any other person; or
>
> (viii) obstruct an ongoing criminal investigation."

The Illinois Freedom of Information Act is coasistent with Freedom of Information Acts in other states as well as the provisions of the Federal Freedom of Information Act. *McCormick on Evidence*, Fifth Ed. 1999, § 108(b); Freedom of Information Act, 5 USC § 552(B)(1); *John Doe Agency v.*

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disclosure would compromise security (§ 7(1)(k)); minutes of closed public meetings until released under the Open Meetings Act (§ 7(1)(m)).

John Doe Corp., 493 U.S. 146, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1981). As stated in *McCormick*,

> ". . . Clearly, however, disclosure of the files of law enforcement agencies may seriously hamper enforcement efforts by discouraging or compromising confidential informants; disclosing the existence, targets, or methods of investigation; endangering witnesses or law enforcement personnel; or undermining a criminal prosecution or civil enforcement proceeding by revealing the nature of the case in preparation."

McCormick on Evidence, Fifth Ed. 1999, § 108(b), page 433.

When the Chicago Police Department claimed exemption under the Illinois Freedom of Information Act, Plaintiffs were entitled to conclude that the actions of the police officers on January 1, 2000 related to a pending, secret investigation and that the information requested would interfere with law enforcement proceedings; or would unavoidably disclose confidential sources or confidential information; or would disclose unique and specialized investigative techniques related to the detection, observation or investigation of incidents of crime or misconduct; or would endanger the life or physical safety of law enforcement personnel; or would obstruct an ongoing criminal investigation. There was nothing in the claim of exemption which would lead the Plaintiffs to suspect that it was false.

The claim of exemption should be considered with the history of the Chicago and its Police Department and their often valiant and difficult efforts to control unlawful activities under investigations over many years, including investigations relating to the prohibition laws, drug enforcement, gang

activities, civil rights and other unlawful activities which the Chicago Police Department has had to investigate. What happened in the early morning hours on January 1, 2000, was consistent with a claim that a major investigation was in process relating to drug activity. Even the decision to conduct an unlawful strip search at the site could have been part of that investigation. There was nothing in the claim of exemption which would indicate that it could be false.

The Court of Appeals, in its opinion, did not consider the claimed exemption under the Illinois Freedom of Information Act or the falsity of that claim. Neither did the District Court. Claims of exemption under the Freedom of Information Act should be narrowly construed. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153, 110 S. Ct. 471 (1989), 107 L. Ed. 2d 462 (1989). The same narrow construction of claimed exemption under the Illinois Freedom of Information Act should be applicable. It is important that this Court consider this question on certiorari to further emphasize the importance of careful, accurate, and truthful exercise of the right of the public agency to claim exemption from disclosing information requested under any Freedom of Information Act - federal or state.

3. Defendants are equitably estopped from asserting that Plaintiffs' claim was barred by statute of limitations because the Chicago Police Department's assertion that the requested information as to the identity of the police officers was exempt under the Illinois Freedom of Information Act, was false.

The claim of exemption under the Freedom of Information Act was ultimately shown to be false. A false assertion made by a responsible public agency clearly estop Defendants from

claiming that Plaintiffs' action was barred by the statute of limitations. Defendants were not prejudiced. Sixty days after the arrest the Chicago Police Department had all of the facts based on its own investigation. It had interviewed both Plaintiffs who were without benefit of counsel, it knew there was a problem. Only the false claim of exemption would make that problem go away. It would be manifestly unfair to Plaintiffs who had been wronged and who have done no wrong to hold that Defendants were not equitably estopped to assert the bar of the statute of limitations.

Further, in considering whether equitable estoppel should apply, the court should consider that the actions of Police Officers Damon Ferrer and Julie Hudson in conducting the strip search was totally unlawful.

The Illinois Code of Criminal Procedure 725 ILCS 5/103-1 states specific requirements relating to strip search including:

> "(d) 'Strip search' means having an arrested person remove or arrange some of <u>all</u> of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.
>
> (e) All strip searches conducted under this Section shall be performed by persons of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.
>
> (f) Every peace officer or employee of a police department conducting a strip search shall:

> (1) Obtain the written permission of the police commander or an agent thereof designated for the purposes of authorizing a strip search in accordance with this Section.
>
> (2) Prepare a report of the strip search. The report shall include the written authorization required by paragraph (1) of this subsection (f), the name of the person subjected to the search, the names of the persons conducting the search, and the time, date and place of the search. A copy of the report shall be provided to the person subject to the search."

The allegations of the complaint are deemed admitted on Defendants' Motion to Dismiss. No written permission of the police commander was obtained. There was no report by the person conducting the search. No copy of a report was provided to the person subject to the search. Although the strip search was conducted by a female, it was conducted in full view of the male officer and of anyone nearby on the street or sidewalk, or in the nearby houses. This inexcusable action destroys any claim that a period of fifty-four days was a bar to equitable estoppel.

CONCLUSION

For the reason stated, a Writ of Celtiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 03-1595

[Decided February 20, 2004]

SALLY HINES and ERIN HINES,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.,
Defendants-Appellees.

JUDGES: Before Hon. MICHAEL S. KANNE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

On consideration of the petition for rehearing filed by plaintiffs-appellants on February 4, 2004, all of the judges on the original panel have voted to deny the petition.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 03-1595

[Decided January 21, 2004]

SALLY HINES and ERIN HINES,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.,
Defendants-Appellees.

JUDGES: Before Hon. MICHAEL S. KANNE, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

The allegations underlying this § 1983 suit are troubling: the plaintiffs, Sally and Erin Hines, claim that as they were driving late one night on the west side of Chicago, they were stopped without probable cause by two police officers and subjected to an open-air strip search. But the merits of this claim were never reached--the statute of limitations ran before the individual police officers were added to the complaint. The question on appeal is whether the plaintiffs should have

been able to avoid the statute of limitations through either equitable tolling or equitable estoppel.

The issue arises because of the rules of liability under 42 U.S.C. § 1983. A local government is not liable for the wrongful actions of its officers and employees unless those actions resulted from an established policy or custom. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In the absence of such a policy or custom, a plaintiff must sue the officers individually, in their own names. If a plaintiff does not know the names of the officers, she can nevertheless proceed by filing a complaint against unidentified officers, and later amending the complaint when their real names are discovered. But because the amendment does not "relate back" to the date of the original pleading, *see* Fed. R. Civ. P. 15(c); *Delgado-Brunet v. Clark*, 93 F.3d 339, 344 (7th Cir. 1996), the officers' names need to be added before the expiration of the relevant statute of limitations--two years for claims in Illinois under § 1983, *Clark v. City of Braidwood*, 318 F.3d 764, 766 (7th Cir. 2003).

In this case, the original complaint was filed in December 2001--still within two years of the alleged search on January 1, 2000--but it was not amended to include the officers' real names until the end of October 2002. The claims against the officers are therefore barred unless the plaintiffs can avoid the statute of limitations, through either equitable tolling or equitable estoppel.

The doctrine of equitable tolling allows a plaintiff to file a claim after the statute of limitations has expired, but only if she was unable to do so earlier despite the exercise of "reasonable diligence." *See Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002); *Singletary v. Cont'l Ill. Nat'l Bank and*

Trust Co. of Chicago, 9 F.3d 1236, 1242 (7th Cir. 1993). To show that they diligently tried to find out the names of the officers, the plaintiffs in this case point to a series of requests they made to officials in the Chicago Police Department between December 2000 and July 2001. The officials were unresponsive, either ignoring the plaintiffs' letters, referring them to other department officials, or refusing outright to provide the information. The plaintiffs finally got the information not from the police department but from the City's corporation counsel, in response to a subpoena issued in July 2002. They added the officers' names to the complaint soon thereafter.

The district court dismissed the claim against the officers, concluding that the plaintiffs had not been reasonably diligent. We agree. The method that finally uncovered the officers' names--the use of discovery after the filing of the lawsuit--was available to the plaintiffs long before the statute of limitations expired. *See Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 & n.3 (7th Cir. 1996) (discussing the use of discovery to identify unknown defendants). It is plain from the record that they knew of this option: their own lawyer, requesting information in May 2001 from police superintendent Terry Hillard, advised that absent a response, his clients had "directed him to file a legal action" and that "discovery procedures would be available to obtain the requested information. "Nevertheless, the plaintiffs did not file their suit until a month before the deadline, and waited until seven months after that to make the necessary discovery requests. They have not explained why they failed to take advantage of discovery until July 2002.

Instead, the plaintiffs argue that the City's failure to respond to their earlier requests, and its failure to identify the officers in its answer to the original complaint, should estop

it from raising the statute-of-limitations defense on behalf of the officers. We addressed an almost identical argument in *Ashafa v. City of Chicago*, 146 F.3d 459 (7th Cir. 1998). As here, the plaintiff in *Ashafa* wished to bring a § 1983 claim against unknown police officers, but was unable to get the police department to release their names. In rejecting Ashafa's equitable-estoppel argument, we noted that the doctrine "requires that a defendant take active steps" to delay or prevent the filing of a suit, "such as destruction of evidence or promises not to plead the statute of limitations as a defense," *id.* at 462. The plaintiff must also show "that he actually and reasonably relied on the [defendant's] misconduct," *id.* at 463. In this case, the City did nothing more than refuse to release the officers' names. We do not see how this can have induced the plaintiffs to delay filing their suit; if anything, it put the plaintiffs on notice that they needed to file suit promptly in order to obtain the names through discovery.

The plaintiffs failed to take timely advantage of available discovery procedures to find out the names of the police officers. And although the City did not fully cooperate with the plaintiffs' other investigative efforts, it did not take any active dissuasive steps on which the plaintiffs can be said to have relied. We therefore AFFIRM the district court's dismissal of the claims against the officers.

APPENDIX C

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Case No. 02-0156

[Filed February 10, 2003]

SALLY HINES and ERIN HINES,)
Plaintiffs-Appellants,)
)
v.)
)
CITY OF CHICAGO, et al.,)
Defendants-Appellees.)
)

OPINION

On December 12, 2001, plaintiffs filed their original complaint seeking damages under federal and state law for an incident involving two Chicago police officers occurring on January 1, 2000. The original complaint named the City of Chicago, Officer Jane Doe, and Officer John Doe as defendants. The complaint has been amended twice, the second amended complaint substituting Officer Julie Hudson for defendant Jane Doe and Officer Damon Ferrer for defendant John Doe. This amended complaint was filed on October 28, 2002. Now, Officers Hudson and Ferrer move to dismiss plaintiffs' federal and state claims expired on January 1, 2002. Plaintiffs do not contest that the statute of

limitations has run on their claims and that they do not relate back, but rather, contend that the claims should not be denied due to equitable tolling, or in the alternative, equitable estoppel.

Plaintiffs allege that they attempted to locate the identity of the officers as early as December 6, 2000 by letter to the Chicago Police Department's Office of Professional Standards ("OPS"). It wasn't until August 12, 2002, after the City of Chicago produced documents requested by plaintiffs, that the officers' identities were discovered, and plaintiffs argue that the statue of limitations should be equitably tolled because despite due diligence, they were unable to obtain this vital information. Equitable tolling is appropriate when "a plaintiff, despite the exercise of due diligence and through no fault of his own, cannot determine information essential to bringing a complaint." *Soignier v. American Bd. of Plastic Surgery*, 92 F.3d 547, 553 (7th Cir. 1996). Plaintiff's counsel has submitted an affidavit detailing his attempts to find Officer Ferrer's and Officer Hudson's identities. That affidavit reveals two significant facts: first, that between July 12, 2001, and July 10, 2002, counsel did nothing to further his search for the officers' identities, and second, that counsel did not contact the City of Chicago's counsel, Mara S. Georges, until July 10, 2002, which is over seven months after the statute of limitations had expired. It was this contact with Ms. Georges that led to the identity of Officers Hudson and Ferrer. Based on these two facts alleged by plaintiff's counsel, I find that due diligence was not exercised and thus reject plaintiff's request that the statute of limitations be equitably tolled.

In the alternative, plaintiffs argue that equitable estoppel defeats the motion to dismiss. However, to invoke equitable estoppel, plaintiffs must show misconduct by Officers Ferrer and Hudson, and actual and reasonable reliance on that

misconduct that prevented plaintiffs from learning their identities. *Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 605 (7th Cir. 1992). Plaintiffs do not allege that the officers are guilty of such misconduct. Instead, plaintiffs argue that because the OPS failed to provide information, the City of Chicago is responsible for inducing plaintiffs to rely to their detriment. This does not constitute misconduct. In contrast, in *Smith v. City of Chicago Heights*, 951 F.2d 834 (7th Cir. 1991), on which plaintiffs rely, the defendant fraudulently concealed his participation, actively concealed his identity, and lied in his deposition. Hence, plaintiffs' equitable estoppel argument fails as well.

For the reasons set above, Officers Ferrer's and Hudson's motion to dismiss is granted.